

APPENDIX

**SAMAN GULAM v. TAN SRI HAJI MOHD. SUNOH
MARSO & ORS.**

**LAU PUI KEONG v. TAN SRI HAJI MOHD. SUNOH
MARSO & ORS.**

**AHMAD BAHROM BIN DATUK HJ. ABU BAKAR
TITINGAN v. TAN SRI HAJI MOHD. SUNOH
MARSO & ORS.**

[S.C. (Abdul Hamid C.J. (Malaya), Seah &
Hashim Yeop A. Sani S.C. JJ.), November 5, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal Nos. 358,
359 & 360 of 1985]

*Constitutional Law – Vacancy in Legislative Assembly
– Decision of Speaker – Constitution of Sabah, arts.
18(2)(b) & 21(5) – Federal Constitution, art. 113.*

*Elections – Interlocutory injunction against Election
Commission – Jurisdiction of court.*

SUPREME COURT.

*James Puthuchearry (Dominic Puthuchearry, Phillip
Koh and Douglas Primus with him) for the appellants.*

*Raja Abdul Aziz Addruse (Sri Ram and Dr. Yaccob
Merican with him) for 1st respondent.*

*T. Selventhiranathan (Senior Federal Counsel) for
2nd to 7th respondents.*

Abdul Hamid C.J. (Malaya) (delivering oral Judgment of the Court): Two vital questions arise in this appeal: (1) the decision of the Speaker of the Legislative Assembly of Sabah on the vacancy of a seat in the Assembly under Article 18(2)(b) and the consequences that follow under Article 21(5) of the Constitution of the State of Sabah; (2) the jurisdiction of the courts to issue an interlocutory injunction against the Election Commission until the determination of the validity of the vacancy of the seat in question by the Court.

The relief sought is discretionary. We agree with Raja Abdul Aziz Addruse that on the facts as disclosed in the affidavit and the reliefs sought the learned Judge was right in refusing to grant the interim injunction. The normal rule is that an ordinary person is bound by his signature. Article 18(2)(b) seems clear enough. The Article reads –

“18.(2) An elected or nominated member shall also vacate his seat in the Assembly if –

(a)

(b) he resigns his seat by writing under his hand addressed to the Speaker.”

In an appeal of this nature this Court must be satisfied before it interferes that the learned Judge had erred in law in that he exercised his discretion based on wrong principles of law. We are of the view that the learned Judge had not acted erroneously.

A With regard to the second question, our view is that the Election Commission performs its functions under the Constitution. Its functions are clearly set out in Article 113 of the Federal Constitution, that is, subject only to the provisions of the Federal law, to conduct elections to the House of Representatives and the Legislative Assemblies of the States. The State Constitution expressly provides under Article 21(5) that

B “Whenever the seat of an elected member has become vacant for any reason other than a dissolution, the vacancy shall, within ninety days from the date on which it is established that there is a vacancy, be filled by election in accordance with the provisions of this Constitution:

C Provided that if a casual vacancy is established on a date within six months of the date the Legislative Assembly shall, in accordance with clause (3) of this Article, stand dissolved, such casual vacancy shall not be filled.”

We are of the view that the Judge was correct in not granting the interlocutory injunction against the Election Commission.

D In light of the reasons given above, we dismiss the appeal with costs.

Deposit to respondents to account for taxed costs.

Order accordingly.

E Solicitors: *Luping Koding Kurup Golokin Noor & Co.; Sri Ram, Zulkifly & Kumar.*

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**MBF FINANCE BHD. v. MALAYSIA AIR
CHARTER CO. SDN. BHD. & ORS.**

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah
S.C.JJ.) June 10 & August 1, 1987]

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[Kuala Lumpur – Supreme Court Civil Appeal No. 496
of 1986]

Practice and Procedure – Judgment debt – Interest on – Whether High Court has jurisdiction to award interest in excess of 8% per annum on judgment debt – Distinction between “debt” and “judgment debt” – R.H.C. 1980, O. 42, r. 12 – Courts of Judicature Act, 1964, ss. 16, 25, Schedule – Civil Law Act, 1956, s.11.

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In this case an Equipment Lease Agreement had been executed between the appellant as lessor and the first respondent as lessee. The remaining respondents were the guarantors. Article 18(d) of the Lease Agreement provided that the lessee shall pay additional interest at the rate of 2% per month on whatever sums are in arrears calculated from the date such sums are due for payment until the date of actual payment by the lessee. The appellant brought an action to recover arrears due under the lease agreement and claimed to be entitled to interest at the rate of 2% per month not only on the amount due up to the date of

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judgment but also from the date of the judgment till actual payment. The learned trial judge held that the appellant was only entitled to interest at 8% per annum on the judgment debt as from the date when default judgment was entered. The appellant appealed.

Held, dismissing the appeal: (1) where there is a debt secured by a covenant and judgment is recovered on the covenant the debt on the covenant merges in the judgment debt. In this case therefore the debt or any part of the rent which has been in arrears is no longer payable under the covenant, it is payable under the judgment; the covenant to pay interest at 2% of the debt or rent which has been in arrears is gone and is merged in the judgment;

(2) the learned judge was correct in holding that the appellant was not legally entitled to claim interest at 2% per month on the judgment debt as from the date when default judgment was entered but only entitled to interest at 8% per annum until full payment.

Cases referred to:

- (1) *President of India v. La Pintada Compania S.A.* [1985] 1 A.C. 104, 122-128.
- (2) *Riches v. Westminster Bank* [1947] A.C. 390, 400-402.
- (3) *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co.* [1893] A.C. 429.
- (4) *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] 1 M.L.J. 296.
- (5) *Damodaran v. Choe Kuan Him* [1979] 2 M.L.J. 267, 270.
- (6) *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower* [1981] 2 M.L.J. 199, 203.
- (7) *In re Agriculturist Cattle Insurance Company* (1876) 4 Ch. D. 34.
- (8) *In re European Central Railway Company* (1876) 4 Ch. D. 33.
- (9) *In re Sneyd* (1884) 25 Ch. D. 338.
- (10) *Economic Life Assurance Society v. Osborne* [1902] A.C. 147.

SUPREME COURT.

Loh Siew Cheong (Mohd. Ariff Yusoff with him) for the appellant.

Megat Nazirudin for the respondents.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): The issue in this appeal falls within a narrow compass. It is whether the High Court has jurisdiction to award interest in excess of 8% per annum on a judgment debt?

It is admitted that every judgment debt shall carry interest. For the respondents it was submitted that the maximum rate of interest which a judge is empowered to award from the date of judgment is 8% per annum. Learned counsel for

A the appellant, however, contended that the court has jurisdiction to direct interest at 2% per month, the rate of interest which the parties have agreed.

We do not think it necessary to set out in detail the position of the courts in England on the award of interest *before* judgment at common law or under statutory powers because this matter has recently been examined and reinstated extensively by Lord Brandon in giving the leading judgment of the House of Lords in the case of the *President of India v. La Pintada Compania S.A.* ⁽¹⁾ [See also Lord Wright's summary in *Riches v. Westminster Bank.* ⁽²⁾] It is sufficient if we summarise the position in England (as we understand it) by stating that before the Civil Procedure Act 1833 (Lord Tenterden's Act) the courts in England could only give interest if there was an agreement to that effect, express or implied or by mercantile custom. The common law position was modified by the 1833 Act and under section 28 of that Act interest could be awarded if a debt or sum certain was payable by virtue of a written instrument at a certain time. Interest by way of damages was also allowed on all other debts or sums certain if a written demand for payment was made on the debtor giving him notice that interest would be claimed from the date of demand until payment, but interest on damages was only allowed by the statute in a limited class of actions which we need not outline here for they do not include breach of contract. These restrictions were adversely commented upon by Lord Herschell L.C. in *London, Chatham & Dover Ry. Co. v. South Eastern Ry Co.* ⁽³⁾ Some forty years later Parliament enacted the Law Reform (Miscellaneous Provisions) Act 1934 and section 3(1) of the Act attempted to deal with the problems raised by Lord Herschell L.C. However, on the power of the High Court to award interest *after* judgments the position in England appeared to be governed by the Judgments Act 1838 and section 17 provided that "Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment ... until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." Under the 1838 Act interest was awarded only in respect of the period from the date of settlement or realisation. The statutory rate of interest of 4% per annum on the judgment debt remained the standard rate until April 20, 1971 because by virtue of Judgment Debts (Rate of Interest) Order 1971 made under section 44 of the Administration of Justice Act 1970 which implemented the recommendation of the Report of the

Committee on the Enforcement of Judgment Debts (Cmnd. 3909 (1069) para 1168), the statutory rate of interest was raised to 7½% per annum. The statutory rate has been altered several times since section 44 came into operation in 1971, e.g. —

Since March 1, 1977 — the rate of interest was 10% per annum [see Judgment Debts (Rate of Interest) Order 1977 (SI 1977 No. 141)];

Since December 3, 1979 — it was 12½% per annum [Judgment Debts (Rate of Interest) Order 1979 (SI 1979 No. 1382)];

Since June 9, 1980 — it was 15% per annum [Judgment Debts (Rate of Interest) Order 1980 (SI 1980 No. 672)];

Since June 8, 1982 — it was 14% per annum [Judgment Debts (Rate of Interest) Order 1982 (SI 1982 No. 696)];

Since November 10, 1982 — it was 12% per annum [Judgment Debts (Rate of Interest) (No. 2) Order 1982 (SI 1982 No. 1427)] and

Since March 1, 1986 — it was 15% per annum [Judgment Debts (Rate of Interest) Order 1985 (SI 1985 No. 437)].

We turn now to consider the legal position in Malaysia.

Prior to *Malaysia Day* (September 16, 1963) the law regulating the power of the High Court in Malaya to give interest at such rate as it thinks fit between the date when the cause of action arose and the date of the judgment in a suit for debt or damages was governed by section 11 of the Civil Law Act 1956 and Order 40 rule 11(1) of the Rules of the Supreme Court 1957. However, on *Malaysia Day* the Rules of the Supreme Court 1957 including Order 40 Rule 11(1) applied throughout Malaysia but the Civil Law Act 1956 including section 11 was only extended to the states of Sabah and Sarawak as from April 1, 1972. We like to point out that the provisions of section 11 of the Civil Law Act 1956 and Order 40 Rule 11(1) of the Rules of the Supreme Court 1957 are in identical terms except that under section 11 the power is extended to all the courts of competent jurisdiction in Malaysia whereas under Order 40 Rule 11(1) it is confined only to the High Courts in Malaya and Borneo. A compari-

son of section 11 and Order 40 Rule 11(1) with section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 would appear to indicate that the wordings are substantially the same. It would not be far wrong to say that section 11 of the Civil Law Act 1956 and Order 40 Rule 11(1) of the Rules of the Supreme Court 1957 have been lifted from section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

With regard to interest after judgment this was governed by Order 40 Rule 11(2) of the Rules of the Supreme Court 1957 which reads:

“Every judgment for the payment of money shall bear interest at the rate of six per centum per annum.”

It was common ground that the Rules of the Supreme Court 1957 were made by the Rule Committee established under section 3 of the Rule Committee Ordinance 1955 (since repealed) and that Order 40 Rule 11(2) of the 1957 Rules appeared to have been enacted under section 4(g) of the said Ordinance which reads:

“4. It shall be the duty of the Rule Committee from time to time and as occasion may require to make rules for the following purposes —

(g) for regulating the rate of interest recoverable on debts, including judgment debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Supreme Court:

Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties;”

The position remained unchanged even after *Malaysia Day*. However, the 1957 Rules were replaced by the Rules of the High Court 1980 made by the Rule Committee pursuant to sections 16(i) and 17 of the Courts of Judicature Act 1964 and these 1980 Rules came into force throughout Malaysia on June 1, 1980. Order 42 Rule 12 of the 1980 Rules specifically deals with interest on judgment debt and it reads:

“Every judgment debt shall carry interest at the rate of eight per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.”

That in brief was the position in Malaysia when the Equipment Lease Agreement (ELA) was executed between the appellant as Lessor and the 1st respondent as Lessee on August 20, 1984. The

remaining 2nd, 3rd, 4th and 5th respondents signed as guarantors of the ELA and all of them have been sued by the appellant in that capacity.

Reliance was placed on sub-paragraph (i) of section 16 of the Courts of Judicature Act 1964 which reads:

"16. Rules of Court may be made for the following purposes:

- (i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court:

Provided that in no case shall any rate of interest exceed eight per centum per annum, *unless it has been otherwise agreed between parties* (emphasis given);"

The main thrust of the submission was directed at the proviso and in particular the words in italics. It was the contention of learned counsel for the appellant that the italicized words in the proviso preserves the contractual rights of the parties and does not confer any power on the Rule Committee to interfere with the interest rate which the parties have agreed. And if a party had contracted to pay interest at the rate of 2% per month or 24% per annum this rate should *prima facie* be allowed by the court unless a statute otherwise provides. Learned counsel for the respondents conceded for the purpose of this appeal only that the appellant was entitled to charge interest at the agreed rate of 2% per month or 24% per annum up to the date of judgment under section 11 of the Civil Law Act 1956 but objected to appellant claiming the same interest rate or any other rate in excess of the statutory limit of 8% after judgment had been entered. A recent decision of this Court [Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Syed Agil Barakbah S.C.JJ.] in the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken*⁽⁴⁾ is cited in support of the proposition that "where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under Order 42 Rule 12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction ...".

In our opinion, the proviso to section 16(i) is to be read subject to the provisions of section 25 of the Courts of Judicature Act 1964 which are in the following terms:

A "25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

B (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same."

C Item 7 of the Additional Powers of the High Court which is contained in the Schedule reads:

"7. Powers to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court."

D As was rightly pointed out by the learned judge in the court below, such additional powers of the High Court are to be exercised only in accordance with any written law or rules of court relating to the same [see the dictum of Lord Diplock in *Damodaran v. Choe Kuan Him*⁽⁵⁾ and the judgment of the Federal Court in *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower*⁽⁶⁾].

F In our opinion, section 16(i) of the Courts of Judicature Act 1964 clearly empowers the Rule Committee to make rules of court to regulate the interest rate on all debts including judgment debts which a court or judge may give subject to the 2 restrictions expressly stated in the proviso, *viz*:

- G (a) in the absence of an agreement the maximum rate of interest shall not exceed 8% per annum and
- (b) interest rate which has been mutually agreed by the contracting parties shall remain unaffected.

H In support of the claim that the appellant was entitled to 2% interest each month after judgment learned counsel for the appellant appeared to rely on Article 18 sub-paragraph (d) dealing with Late Payments in the Equipment Lease Agreement which reads:

I "Late Payments

Lessee shall pay additional interest at the rate of 2% per month on whatever sums (whether Basic Rent or Supplemental Rent) which are in arrears calculated from the date such sums are due for payment until the date of actual payment by Lessee."

Learned counsel for the appellant has referred us to a number of authorities to indicate how the courts in England have been dealing with the interpretation of a "proviso" but on examination of these authorities we find that none of them proved to be sufficiently in point to be of assistance in the construction of the problem which we have to consider in the present appeal.

In our opinion, the issue before this Court is simply a question of construction. It seems clear from the authorities [see *In re Agriculturist Cattle Insurance Company*,⁽⁷⁾ *In re European Central Railway Company*,⁽⁸⁾ *In re Sneyd*⁽⁹⁾ and *Economic Life Assurance Society v. Osborne*⁽¹⁰⁾] that any agreement on the payment of interest is to be construed strictly by the courts and the onus is plainly on the party who claims interest in excess of the statutory rate of 8% per annum.

Having considered the judgments of Cotton and Lindley L.JJ. in the case of *In re Sneyd* (*supra*) in our opinion, the true construction of this sub-paragraph (d) is this, that interest at the rate of 2% per month shall be payable so long as any part of the Basic or Supplemental Rent is in arrears and remains due under Article 4 of the Equipment Lease Agreement (ELA) so as to enable the appellant as Lessor to sue upon it and to enforce payment of that sum or any part thereof. So long as any part of the Basic or Supplemental Rent or debt is due under this sub-paragraph (d) interest at 2% per month shall operate. Now, it may be technical, but it is well settled that, if there is a debt secured by a covenant, and judgment is recovered on the covenant, the debt on the covenant merges in the judgment debt. In point of law the debt or any part of the Basic or Supplemental Rent which has been in arrears is no longer payable under the covenant, it is payable under the judgment; the covenant to pay interest at 2% per month on the debt or the Basic or Supplemental Rent which has been in arrears is gone. It is now merged in the judgment. Being a judgment debt it is governed by Order 42 Rule 12 of the Rules of the High Court 1980 and not by sub-paragraph (d) of Article 18 of the ELA. Such an interpretation would appear to be in accord with the recent decision of this Court in the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken* (*supra*). At page 297 this Court said that "after judgment, the judgment creditor enjoys the privilege of having the assistance of the courts in enforcing the judgment or he may initiate bankruptcy proceedings. Without obtaining judgment a judgment creditor cannot do either of these."

A It is said that it is a hardship upon the appellant because it is worse off by reason of its diligence in bringing the action. The short answer is that the appellant was not compelled to bring the action against the respondents; it brought it in order to obtain the advantage of an execution [see the dictum of Bramwell J.A. in *In re European Central Railway Company* at page 38 (*supra*)].

C We like to point out that a distinction appears to have been made by the legislature between "debts" (before judgment) and "judgment debts" (after judgment including default judgment). This distinction must be borne in mind when the court or judge is dealing with an application for interest exceeding 8% per annum on the judgment debt.

D Based on the interpretation which we have given to sub-paragraph (d) of Article 18 of the Equipment Lease Agreement dated August 20, 1984, it would appear to follow that the appellant's case against the 2nd, 3rd, 4th and 5th respondents would also fail.

E For the reasons which we have given above, we agree with the learned judge that on the true construction of sub-paragraph (d) the appellant was not legally entitled to claim interest at 2% per month on the judgment debt as from the date when default judgment was entered but only entitled to interest at 8% per annum until full payment.

F The appeal is therefore dismissed with costs to the respondents. The deposit of \$500.00 is to be paid to the respondents on account of taxed costs.

G *Appeal dismissed.*

Solicitors: *Joseph Tan & Tang; Mutalib & Bakaruddin.*

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